In The

SUPREME COURT OF THE UNITED STATES

October Term, 1948 - - - Numbers 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

Brief of
Wisconsin State Industrial Union Council.
(As Amicus Curiae)

MAX RASKIN,
Attorney for
Wisconsin State Industrial Union Council.

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THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Wisconsin is reported in 250 Wis. 550, 27 N. W. (2) 875 (R. 106-121).

JURISDICTION.

Because the judgment of the Supreme Court of Wisconsin, filed in this action, has such far reaching implications and is of such great importance to all workingmen, organized or unorganized, the Wisconsin State Industrial Union Council respectfully submits this brief as *amicus curiae*.

The Federal question of whether the Wisconsin Statutes in question and the order and judgment purportedly based on such statutes violated the Constitution of the United States thus was raised before every tribunal before which argument was heard.

The Supreme Court of the State of Wisconsin specifically held that neither the Wisconsin Statutes nor the order based on such statutes, as construed, deprive the petitioners of any rights guaranteed under the provisions of the Constitution of the United States.

The Wisconsin Supreme Court has taken the position that mere work stoppages in connection with a labor dispute, but not associated with any violence, boycotting, or picketing, are validly restrained by the order and judgment herein; that such restraints are supported by the provisions of Chapter 111, Wisconsin Statutes 1945, and that the question of the violation of constitutional guarantees alleged by the petitioners to have been breached by th order should be determined adversely to the petitioners.

ARGUMENT.

The issue involved is clearly stated in the opinion of the Wisconsin Supreme Court, 250 Wis. 550, at page 553. We can do no better than to quote:

"The evidentiary facts are not in dispute. The Briggs & Stratton Corporation was engaged in manufacturing and operating two plants. A contract between the union and the company had expired. The union was the representative of the employees for the purpose of collective bargaining. Collective bargaining was in process to fix the terms of a new contract. During such bargaining both plants were in operation. While so in operation the employees of the company at the instance of the union and its officers had by concerted action while at work stopped work during their scheduled working hours and remained away until their next scheduled hour for commencement of work. The work was conducted by two shifts. The day shift quit work during their working hours and stayed away until the following morning and then resumed work. The night shift on these occasions when the day shift quit work failed to appear for work during their scheduled hour for work the night of that day and returned for and resumed work at their scheduled hour for commencing work on the next night. The total number of these instances was twenty-seven. In each instance the employees of the shift left in an orderly manner and went directly to attend a union meeting off the premises previously ordered by the union. These meetings were called by certain

> of the defendants as officers or committees of the union at irregular times. No advance notice of the meetings was given to either the company or the employees because it was considered that without any notice the stoppages would most lessen production and effect injury on the company. The times were fixed without any other reason or purpose. The employees were told to go forthwith and went as told. The action of the employees was a concerted effort to, and did, interfere with production and was taken as economic pressure to compel the company to comply with the union's demands respecting the terms of the contract being negotiated. It was a concerted action taken for the purpose of interfering with production and it so operated."

The order of the Wisconsin Employment Relations Board, adopted and ordered enforced by the judgment of the Wisconsin Supreme Court, reads as follows:

> "(a) Engaging in any concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours or engaging in any other concerted effort to interfere with production of the complainant except by leaving the premises in an orderly manner for the purpose of going on strike."

The judgment in this case holding that the concerted stopping of work and leaving the premises of an employer, is an unfair labor practice, merely because it interferes with production, is, we respectfully submit, a very dangerous doctrine.

which that power may be used. The mere fact that that power exists and may be used *is the most important factor in preserving industrial peace.*

If that economic power of concerted quitting is left intact, *even though it may never be used,* employers are compelled to give some heed to the workman's dmand for a decent living wage and decent working conditions.

CONCLUSION.

Acting in concert is the only possible way under present economic conditions, for workmen to put their price on their labor.

No man can be free, as we in America understand freedom, if he cannot sell his labor at his own price, determined by fair and equal bargaining.

No man can be a free workman if he is compelled to work even though dissatisfied with his wage, despite his theoretical, but wholly illusive, right to quit as an individual.

Even though it would be an easy matter to analyze and distinguish from our present problem, the cases cited in other briefs, we have not done so, because we believe that the basic theory of this judgment is in itself a violation of not only the Federal and State Constitutions, but also a perversion of American tradition.

Respectfully submitted,

MAX RASKIN,
Amicus Curiae.

The inalienable right of a man to work or not to work for a given employer is, by this judgment, completely abrogated.

The concomitant, inalienable right to put his own price on his labor is seriously interfered with.

The only method a workingman has to secure the value he places upon his labor is by refraining from selling it below that value.

The concerted action of groups of workers to maintain and secure the price for which they are willing to exchange their labor is now universally accepted.

The concerted quitting of work for the purpose of compelling the employer, by the economic pressure thus exerted, to pay the value of the services determined by the giver of such services, is the only bargaining power the workingman has.

To say that the workers may quit in concert for a period of a week, or a month, or a year, and be within the law, and to deny them the right to quit their work for one day, we respectfully submit is a novel doctrine.

When there is a dispute between an employer and his employees as to the value of the services or the conditions under which such services are to be rendered, a very serious situation presents itself.

The employer has it within his power to close down his plant and place all of his employees in an economic position which can result in misery and semi-starvation. On the other hand the employees can refuse to work and thus close down the employer's plant and destroy his profits.

Neither the employers nor employees wish to prolong a dispute until the above described conditions result.

Every labor dispute is finally settled on a give and take policy. If the courts interfere with the right of employees to leave their employer either singly or in concert, when they are dissatisfied with the conditions offered them, the only method of the workers to attain their demands is destroyed.

To interpret Section 111.06(2)(h) of the Wisconsin Statutes to mean that the concerted stopping of work and leaving the premises of the employer constitutes an unfair labor practice seems to us to be a perversion of the meaning of the section. The only stoppage or slow-down of work prohibited By Section 111.06(2)(h) is to interfere with producton *on the premises* of the employer:

The section reads:

> "(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."

The Employment Peace Act, Chapter 111 of the Wisconsin Statutes, does not provide that a secret ballot must be taken to call a strike. The section provides merely that no overt concomitant of a strike shall be engaged in.

Section 111.06(2)(e) reads:

> "To co-operate in engaging in, promoting or inducing picketing (not constituting an exercise of constitutionally guaranteed free speech), boycot-

ting or any other overt concomitant of a strike unless a majority in a collectitve bargaining unit of the employees of an employer against whoin such acts are primarily directed have voted by secret ballot to call a strike."

There is no prohibitation in the law of the State of Wisconsin or the United States of America for the quitting in concert of the employees of any employer. The holding of a secret election is merely for the purpose of protecting their rights to picket and patrol and engage in the other concomitants of a strike.

The problem involved in this judgment is too fundamental to be solved by refined definitions or legal quibbling.

Section 22, Article 1, Wisconsin Constitution reads:

"The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

Some of these fundamental principles are detailed in Article 1.

Sec. 1, Article 1, reads:

"All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

Section 2, Article 1, reads:

> "There shall be neither slavery, nor involuntary servitude in this state, otherwise than for the punishment of crime, whereof the party shall have been duly convicted."

Sec. 4, Article 1, reads:

> "The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

We respectfully submit that not only the provisions of Sec. 111.06(2)(e)(h) as construed, but the underlying theory of which this judgment is the fruit, violates each and every one of the above quoted sections of the Wisconsin Constitution and Article I, Section 8 and Article VI and the Thirteenth and Fourteenth Amendments of the Constitution of the United States.

The theory referred to clearly appears in the opinion of the Wisconsin Supreme Court, page 560:

> "From the above we think it clearly follows that the employees did not engage in the stoppage of work involved for the purpose of 'going on strike' and that the concerted effort to interfere with production constituted an unfair labor practice under par. (h) of sec. 111.06(2), Stats. The union and the individual defendants caused the walkouts and the refraining from work for the purpose of interfering with production above quoted and under sec. 111.06(3) they were all guilty of an un-

fair labor practice whether they in fact were among the employees who did those things or not."

It was upon this theory and its inevitable extension that the National Socialists of Germany and the Communists of Soviet Russia, based and built an economic and political system diametrically opposed to our Constitutional Government.

Baldly stated the most sacred individual rights are subordinate to the State, and are subject to complete extinction.

We used the term "State". The Germans called it the "Fatherland Reich"; the Russians call it the "good of the masses."

The term used means nothing. It is the destruction of individual rights that results inevitably from the acceptance of this theory that has meaning.

We are not going to engage in any refined definitions of what constitutes a strike.

If two or three or a thousand or ten thousand employees are dissatisfied with their wages or working conditions, they are prohibited from stopping work in concert. They are compelled to continue selling their labor below the price they set on it.

It is sheer nonsense to argue that Section 111.06(2) guaranteeg each individual the right to quit his job.

If there is one concept in labor relations that is fully and completely accepted in the United States, it is that the individual employee can in no real sense bargain in the Labor market. It is only by acting in concert that employees even approach equality with employers in the wage bargain.

The Court will note that the Constitution reads:

"There shall be neither slavery, nor involuntary servitude * * * "

A clear distinction is made between "slavery" which was then well known, and service against the will.

Involuntary servitude does not necessarily require physical compulsion. An overseer with a black snake whip. Chains and leg irons. Bloodhounds and shotguns.

It is idle to argue that the extent of the curtailment of an individual's rights is determined by the construction of the law as applied in a particular case.

The language is too plain and unambigttous to need any construction.

The employees acting in concert are prohibited from causing any work stoppage. That means in the plainest of English prohibited from quitting their jobs.

The matter involved herein is too fundamentally important to be covered by verbal screens.

This Act violates Sec. 4, Const. in that it prohibits the rights of these employees "to consult for the common good."

They are prohibited from acting in concert. They cannot consult for their common good, if the consultation results in a recognition of a common dissatisfaction with wages and workng conditions.

Of course, they can meet together (but not if they must quit work to do so) and discuss their trials and tribulations, but their activity is limited to mutual consolation.

Do the words of the Constitution "consult for the common good" merely mean they can meet and weep on each other's shoulders?

We must not confuse the issue in arguing that limitation on the right to strike has been upheld by the courts.

Limitation and regulation are far different than prohibition.

Of course the right to strike has been regulated and in some instances limited.

The present Federal Management and Labor Law, commonly known as the Taft-Hartley Law, regulates and limits strikes. But it does not prohibit them completely. Nor does it prohibit quitting in concert. Nor does it compel men to continue to work against their will.

It is this confusion of labels, and the straining and refining of definitions, that obscure the real danger in this kind of legislation.

Thomas Jefferson clearly stated this danger when he said:

> "Civil liberty is but the equipoise between contending forces. It is never destroyed at one fell swoop, but by gradual encroachment against which eternal vigilance is essential."

The early courts were *not* primarily interested in the legality of strikes, but were wholly interested in attempts to raise wages, strike or no strike.

It was the temerity of the employees seeking to raise the price for which they would sell their services that occupied the courts in labor relations cases.

Under the Common Law working men had no right to organize or to combine to enforce their demands for higher wages.

In England in the Eighteenth Century, when the laborers combined to enforce their demands, they were prosecuted for conspiracy.

In the **Journeymen Tailors' Case,** 8 Mod. 11 (1721), all combinations to raise wages were held to be conspiracies. This Common Law doctrine was inherited by our fathers from England.

In England the **Journeymen Tailors' Case** was followed by the enactment of statutes to penalize combinations to raise wages. *Even when acting singly,* workers were confronted, until 1813, with laws limiting the amount of wages which they might demand.

53 George III, Chapter 40.

Until 1824, he was punished as a criminal if he combined with his fellow workmen to raise wages or shorten hours, or to affect the business in any way, even if there was no resort to a strike.

In the United States also, there was presented the doctrine of the Common Law that all combinations to raise wages are illegal. These early cases are cited in

Documentary History of American Industrial Society, Volumes 3 and 4.

In **Peoples vs. Fisher,** 14 Wend. 9 (1835), this doctrine was upheld:

> "That the raising of wages and a conspiracy, confederacy, or mutual agreement among journey-

men for that purpose is a matter of public concern and in which the people have a deep interest there can be no doubt. That it was an indictable offense at common law is established by legal adjudications * * *.

I am of the opinion that the offense is indictable * * * "

People vs. Fisher, 14 Wend. (N. Y.) 9; 28 Am. Dec. 501.

On the other hand, collective action by employers was permitted in early law, but only under grant of a special charter from the King. Thus, the King granted charters to free citizens and to merchants and craft guilds. Armed with the charter the association could not be prosecuted as a conspiracy and was conceded the great privilege of acting as a unit and had continuous existence through the rights of succession.

The corporation charter freed the corporation from the taint of conspiracy, and at first could be secured only through special act of the Legislature. Finally, in the decade of the 50's, general corporation laws were enacted. It is now the privilege of all persons to combine their capital and form corporations, with but few restrictions. So complete is the right of association of capital that the law has introduced the fiction that corporations are persons entitled to all the rights of natural persons, and the rule of limited liability lessens the responsibility of the incorporators for the acts of the corporation.

Under the Common Law, as it existed up to that time, there were no restrictions upon the combinations of capital, but there were restrictions upon combinations of workers, both under the common law doctrine and by statute.

When these doctrines were accepted there was no 13th Amendment to the Federal Constitution, nor any Sec. 2, Art. 1 of the Wisconsin Constitution.

It was the raise in wages, the attempt by workingmen to put their own price on the only thing they had to sell or trade, their labor, that was the real concern of employers, backed by the full power of the King or the State.

And today, even though the doctrine of criminal conspiracy has been completely discredited, the same fundamental issue is involved in all labor disputes.

The attempt of workingmen to put their own price on the service they sell.

And it is only by acting in concert that the coercion and intimidation of employers can be met with any real effectiveness.

These words, coercion, intimidation and terror, are words that are freely bandied about and applied to workers acting in concert.

The intimidation, coercion and terror by employers is seldom mentioned and seldom considered in labor relations.

What form of intimidation can compare in potency with the threat of unemployment constantly hanging over the head of the wage worker?

Upon his daily wages depended his very living. His food, his clothing, his shelter. The health of his family, the education and care of his children.

Unemployment deprives him of wages (that is food, shelter, health, education). Even one day's unemployment is a serious business to him.

After he has worked ten or twelve or fifteen years in one line of industry and knows no other means of gaining a livelihood, that threat bulks large in his life. And as he grows older and no longer has the speed and agility of youth, it becomes a positive dread.

An employer who has the power to end the employment and cut off the workers' food and shelter, holds in his hands a weapon that for potency of coercion exceeds the threat of death itself.

Any man may in defiance of what he considers an invasion of his rights as a man, choose death rather than submit, but he must be indeed a superman who can long resist submission to any condition, when the alternative is for himself and for his children the semi-starvation of unemployment.

We stated before that the problem involved in this legislation is too fundamentally important to be solved by fine spun phrases or refined definitions.

To Prohibit Acting in Concert Is to Subject the Individual Workman to All the Power of the Employer's Weapon of Unemployment and Threat of Semi-Starvation.

To argue that under such circumstances there could be any real bargain, or that the workman could put his own price on his labor, is merely playing with words.

The experience of thousands of years should have taught us that industrial peace must be grounded in good faith and fairness of employer and employee, and cannot be forced by any compulsion of the State.

To compare attempts to put a price on one's own labor, with the ordinary business disagreements, that are the subject matter of most judicial actions, is to strain analogy to absurd limits.

The price of one's labor (and in "price" we include conditions under which it shall be given) is the most important matter in the life of a human being. It determines what food he shall eat, where he shall live, what he shall wear, what recreation or culture he may have. It determines the health and being of his children, their education, their culture. It determines what sphere he will occupy in the social structure. Whether he will exist in abject poverty on the minimum of subsistence or whether he and his family will really live in comfort and decency.

It is a prime factor in determining his life during the declining years of his old age. Whether he will be on the scrap heap, an object of private or public charity, or whether he can live in a dignified, independent, peaceful manner.

All of these things are part of the wage bargain, and are adversely affected by any restriction on the bargaining power.

No Combination of Words, in Any Language, Can Cover the Bald, Stark Fact That Prohibiting Workmen From Quitting Their Jobs in Concert, Compels Them to Work Against Their Will.

To say that each dissatisfied workman can quit his job as an individual is to ignore completely the threat of unemployment with its semi-starvation and its misery to the children and the home.

We are dealing with concrete conditions as they actually exist today, not with abstract and academic postulates of possible alternatives.

It cannot be argued that this judgment is narrowly limited to a few situations, and that such narrow limitation should be considered as favorable to the validity of the law.

If the basic theory is accepted, there can be no logical reason why it cannot be extended to any field which is tinged with a public interest.

And every lawful productive occupation supplying human needs or comforts is "tinged with a public interest."

Nazi Germany had no trouble extending it. Soviet Russia has no trouble extending it.

And in our own United States, when slavery, peonage and bonded servants were accepted labor relationships, the court in **People vs. Fisher,** 14 Wend. 9 (1835), had no trouble extending it, saying:

> "That the raising of wages * * * is a matter of public concern."

Exactly the same arguments put forth to sustain this present Act, can be put forth to sustain its extension into all fields of human endeavor.

We do not wish to be misunderstood. We do not take the position that concerted action by workmen cannot be regulated or limited in any manner.

Far from it. But regulation and limitation are far different things than prohibition.

Regulation and limitation leave intact the economic power of concerted action. They merely prescribe methods by